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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1020

MARSHALL WINOKUR and RAE WINOKUR, ABE BRODSKY and CELIA BRODSKY, and ETHELLE KATZ and BERTHA KATZ, et al.,

Petitioners,

vs.

BELL FEDERAL SAVINGS AND LOAN ASSOCIATION, HOME FEDERAL SAVINGS AND LOAN ASSOCIATION, and UPTOWN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Respondents.

BRIEF OF HOME FEDERAL SAVINGS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ADDITIONAL QUESTIONS PRESENTED

1. As to Plaintiffs' Questions Presented 1-2: Whether certiorari should be granted to review dicta where the rejection by the Court of the dicta could not affect the result in the case at bar. (See pages 11-13, below.)

2. As to Plaintiffs' Questions Presented 1-2: Whether a question can be raised via certiorari when (a) the question was expressly waived in the District Court, (b) the District Court expressly relied upon that waiver in deciding the case, (c) the question was not briefed in the Court of Appeals prior to decision, and (d) the question was first presented in a petition for rehearing in the Court of Appeals over Defendants' objection that it had been waived. (See pages 2-11, below.)

3. As to Plaintiffs' Question Presented 3: Whether a question can be raised via certiorari when the same petitioner took exactly the opposite position in a prior petition for certiorari filed *in the same case*. (See pages 13-14, below.)

SUPPLEMENT TO STATEMENT OF THE CASE

Plaintiffs initially sought three forms of relief: (1) injunctive relief; (2) attorneys' fees; and (3) damages. Each of these was abandoned by Plaintiffs at a certain point in the proceedings only to be revived later. The history of Plaintiffs' waverings is crucial to an understanding of the various court rulings in this litigation since different judicial opinions were based on different concessions which Plaintiffs made. Plaintiffs' attempts to resurrect issues

previously conceded also make this case ill-suited for review by certiorari.

1. Admission By Plaintiffs In 1971 That Their Request For Injunctive Relief Was Moot.

Plaintiffs in 1970 requested injunctive relief to prevent Defendants from continuing certain newspaper advertising. In 1971, Defendants moved to stay the case (on the doctrine of primary jurisdiction) in order to obtain a ruling from the Federal Home Loan Bank Board on the propriety of the advertising under Board rules. (R. 195.)* Plaintiffs stated that they expected an agency decision favorable to Defendants (R. 1082) in a lengthy brief opposing referral. (R. 1064-1096.) When the motion was nevertheless granted by the District Court, Plaintiffs sought to have an interlocutory appeal certified under 28 U.S.C. §1292(b) because Plaintiffs thought the issue was of such importance. (R. 447-448.) The §1292(b) motion was denied, as was a motion for reconsideration. (R. 637.) Among other things, the District Court held that a federal judge would give weight to a Board ruling in this case. (R. 435-441.)

Plaintiffs finally prevailed on this point, however. They persuaded the Board to hold, contrary to the District Court, that the matter was not suitable for agency review. They did this by urging in a motion for reconsideration in the District Court that the injunctive part of the case had been "mooted." (R. 446.) Relying on that motion and the af-

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* References are to the pages of the record before the Seventh Circuit (which were consecutively numbered by Plaintiffs). Some of these pages were reproduced in Appendixes filed in the Seventh Circuit. The Court need not review the record to understand the argument herein. The references are added for the sake of completeness and to permit verification if deemed necessary.

fidavit *of Plaintiffs' counsel* attached thereto, the Board stated:

> *Here, the three named defendants appear to have discontinued the advertising complained of by the plaintiffs, and there is no basis which would indicate that they intend to resume such advertising in the future.* Indeed, even the plaintiffs do not contend that the defendants' current advertising (copies of which are attached to *the affidavit of Richard H. Prins, dated March 3, 1971, in support of plaintiffs' motion for reconsideration*) is violative of the Board's advertising regulations or the Federal securities laws. . . . Accordingly, there appears to be no grounds for the Board to institute cease-and-desist proceedings for the sole purpose of determining whether the discontinued advertising which is the subject matter of the litigation may have violated the Board's advertising regulations. (A. 20, R. 483.) (Emphasis added.)

The affidavit *sworn to by Plaintiffs' counsel* and referred to by the Board stated:

> Subsequent to the filing of Plaintiffs' Answering Brief on the question of the Board's primary jurisdiction, *each of the named Defendants has reformed its dividend (interest) payment practices. . . . With these changes, it is believed that all of the activities complained of involving these Defendants over which the Board might arguably have had some authority have now been corrected. . . . As for current practices, the evils complained of have been cured. As for the past, only this Court can provide an appropriate remedy by way of damages.* Accordingly, Affiant submits that the Board does not have jurisdiction herein and a reference to the Board would therefore be futile. (R. 451-452.) (Emphasis added.)

Not until 1975 did Plaintiffs attempt to revive their request for injunctive relief (in an attempt to prevent dismissal of the case for mootness). They alleged no change

in circumstances between 1971 and 1975 and the Seventh Circuit rejected Plaintiffs' attempted resurrection of this issue. (See Pet. Cert. A-7.) In the Petition for Certiorari Plaintiffs again abandon any claim for injunctive relief. Nevertheless, an understanding of the history of this issue is relevant to section 3 of the supplemental facts, discussed at pages 6-7, below.

2. Admission By Plaintiffs In 1973 That They Were Not Entitled To Attorney Fees.

In their petition, Plaintiffs seek an award of attorney fees. However, in a prior petition for certiorari which Plaintiffs filed in this same litigation in 1973, Plaintiffs argued as follows:

> Except for §§9 and 18, the Securities Exchange Act of 1934 does not (unlike the Securities Act of 1933 or the Clayton Act) provide for statutory imposition of attorneys' fees . . . . *Since the case at bar is based upon §10(b) of the Exchange Act no attorneys' fees can be expected in the event plaintiffs are successful in their individual action.*
>
> Neither plaintiffs nor their attorneys are willing to prosecute this $12 case unless the potential of class recovery is dangled as the carrot so that the plaintiffs can hope to recoup their costs and expenses and their attorneys can reasonably expend the time and effort which is needed to successfully prosecute the matter. . . .
>
> Hence, if the plaintiff class order is not appealable then, upon trial, the lower court will, of course, enter a judgment for defendants. This will properly be so since plaintiffs will not have presented their case. (R. 751-752. Citations omitted. Emphasis added.)

Following dismissal of their 1973 appeal, Plaintiffs reversed their position on attorney fees. In their brief opposing Defendant's motion to dismiss for mootness, Plain-

tiffs revived their claim for attorney fees relying on *Wilderness Society* v. *Morton,* 495 F.2d 1026 (D.C. Cir. 1974). (R. 824.) They devoted less than one page to the point. (R. 824-825.) Then *Wilderness Society* was reversed. *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975). After that reversal, Plaintiffs expanded their argument for attorney fees to four pages (on the second appeal). (Pl. Br. 60-63.)

To support their new position, Plaintiffs charged in their second appeal (for the first time) that Defendants acted "vexatiously or oppressively in untenably defending a case." (Pl. Br. 63.) No pleading or brief filed before the District Court in the five years the case had been pending ever charged Defendants' counsel with such conduct. The Plaintiffs never presented any evidence and the District Court never issued any opinion on that issue on which Plaintiffs nevertheless sought "review." Defendants' appellate brief pointed out that the prior ten rulings by federal judges had all adopted the allegedly "untenable" positions urged by Defendants. The Seventh Circuit found "no possible basis" for Plaintiffs' charge and rejected Plaintiffs' position in a sentence. (Pet. Cert. A-8.)

Plaintiffs now abandon their claim of "untenably defending" and urge that the *Alyeska Pipeline* decision is "in no way inconsistent" with Plaintiffs' request for fees. (Pet. Cert. 25.) Having come full circle, they now urge the position they previously described as meritless.

3. Admission By Plaintiffs In 1975 That Their Individual Damage Claims Were Moot.

A similar pattern of taking both sides of the issue occurred with regard to Plaintiffs' damage claims. In Plaintiffs' memorandum opposing Defendants' motion to dismiss the case as moot, Plaintiffs had this to say about their individual damage claims:

> If . . . only monetary claims of the named plaintiffs were involved in this litigation there could hardly be much doubt that the tender by defendants for the full amount of plaintiffs' claims would be sufficient to moot the cause and warrant dismissal under Rule 12, F.R.C.P., for there would then be no case or controversy within the meaning of Article III of the Constitution. (R. 818.)

Defendants' reply memorandum quoted the above and then stated: "The first page of plaintiffs' Memorandum concedes our central contention." (R. 866.)

The only discussion of the point in the District Court's opinion was: "Defendants assert, and plaintiffs concede, that defendants have tendered to plaintiffs the claimed damages ($12 per plaintiff) and costs . . .." Pet. Cert. A-16. Like the parties, the District Court treated the individual damage claims as an uncontested issue.

On appeal, Plaintiffs' opening brief had a lengthy argument section (pages 19-71) covering three issues, including the issue of mootness (pages 56-63). The mootness argument was divided into two arguments:

A. The District Court Erroneously And Without An Evidentiary Hearing Determined That The *Injunctive Relief* Sought By Plaintiffs Was Moot.

B. Plaintiffs' Counsel Are Entitled To *Attorneys' Fees* Despite Absence Of Class Action Treatment And Thus The Cause Was Not Moot. (Pl. Br. ii, 56-63. Emphasis added.)

In other words, in a lengthy appellate brief, plaintiffs explicitly contested dismissal of *only two* of their original three requests for relief: the requests for injunctive relief and attorney fees. Plaintiffs did *not* even discuss their indi-

vidual damage claims. Since plaintiffs did not, neither did defendants except to say: "Plaintiffs concede that their individual damage claims are moot." (Def. Br. 36.) This was never disputed.

Since the parties had not argued the point, the Seventh Circuit simply observed that:

> Plaintiffs do not challenge the adequacy of the amount tendered by defendants to cover their individual losses, and court costs. A favorable decision on the merits will bring them no greater amount of money. (Pet. Cert. A-6.)

The Seventh Circuit did not further discuss the point, which was understandable since it had not been argued. Having lost the appeal, Plaintiffs again changed tack and argued for the *first* time in a petition for rehearing that their individual claims for damages were not mooted.

In brief: (1) Plaintiffs' claim for injunctive relief—which they described as "mooted" in 1971 to prevent an agency referral of the case—was revived in 1975 in an attempt to prevent dismissal of the entire case for mootness. (2) Plaintiffs' claim for attorney fees—which they characterized as meritless in 1973 in an attempt to prevent dismissal of their first appeal—was revived in 1975 in an attempt to prevent dismissal of the whole case. (3) Plaintiffs admitted their claims for individual damages were "moot" in 1975. Both the District Court and the Court of Appeals relied on that admission. But Plaintiffs then retracted their admission in a petition for rehearing and for the first time sought to contest the issue.

Now, in the instant petition for certiorari, Plaintiffs try a new combination of ingredients: they omit discussion of their request for an injunction and brief only their requests for damages and fees. That petition should be denied for the three reasons set out below.

ARGUMENT

I. THE ARGUMENT PLAINTIFFS FIRST MADE IN THEIR APPELLATE PETITION FOR REHEARING IN CONTRADICTION OF THEIR EARLIER EXPRESS CONCESSION SHOULD NOT BE CONSIDERED VIA CERTIORARI.

Plaintiffs' first two "questions presented for review" are really one: Were Plaintiffs' individual damage claims rendered moot when they were paid in full? This point was conceded by Plaintiffs and therefore not considered either by the District Court or the Seventh Circuit. Accordingly, the case comes here upon a truncated record without having been fully briefed or discussed by any lawyer or Judge. That alone is a reason to refuse certiorari.

Moreover, even if the Court disagreed with the grounds given by the Seventh Circuit, either the Court or the Seventh Circuit (on remand) should nevertheless affirm the District Court under Rule 28, F.R.A.P. See, *e.g.*, *United States* v. *White*, 454 F.2d 435, 439 (7th Cir. 1971):

> Finally, we decide not to resolve the issue . . . since it is not properly before us. That issue was neither raised nor decided on the original appeal, has never been briefed and was argued orally for the first time in the *en banc* hearing. Rule 28 of the Federal Rules of Appellate Procedu , (28 U.S.C. Rules) has been interpreted to require that all issues be set out in the appellant's brief and the respondent's answer, and failure to comply may constitute a waiver. [Citing cases.]

Even if an argument is first made in a reply brief, prior to the decision of the Court of Appeals, the argument should not be considered because not properly and timely

raised. *United States* v. *Michigan Carton Co.*, 552 F.2d 198, 201 (7th Cir. 1977):

> [A particular] contention . . . raises a fresh issue in the case which is outside the proper scope of a reply brief under Rule 9(e) of this court. . . . We therefore do not address the argument.

This case is far stronger than those cited above. Here mootness of the request for individual damages was not merely overlooked on appeal. It was explicitly waived before the District Court. It is black-letter law in the Seventh Circuit that a matter waived before a district court cannot be raised on appeal, let alone on a petition for rehearing. *Cannon* v. *U.S. Acoustics Corp.*, 532 F.2d 1118, 1119 (7th Cir. 1976); *Allen* v. *Beneficial Finance Co. of Gary, Inc.*, 531 F.2d 797, 805 (7th Cir. 1967) (even constitutional issues not raised in district court will not be reviewed on appeal); *Hamilton Die Cast, Inc.* v. *United States Fidelity And Guaranty Co.*, 508 F.2d 417, 420 (7th Cir. 1975); *Mark* v. *McDonnell & Co., Inc.*, 447 F.2d 847, 849 (7th Cir. 1971); *King* v. *Stevenson*, 445 F.2d 565, 570-571 (7th Cir. 1971) (issue included in pleadings but not pressed in district court will not be reviewed on appeal). Thus, rejecting the Seventh Circuit's opinion and remanding the case to the Seventh Circuit for further proceedings would produce no different result for the litigants before the Court.

Further, the cases cited above express a policy just as relevant to denying petitions for certiorari as to denying petitions for rehearing. Courts should require that issues be timely presented, both for efficiency and fairness. Had Plaintiffs raised an additional point before the District Court, Defendants could have filed affidavits, taken discovery, made different arguments or otherwise taken action to have the matter presented fully. It is unfair to remand the case and require court and counsel to start

over. Counsel should not be allowed to lay in the weeds, pressing a particular theory before the District Court and holding back another theory to attempt to obtain a reversal if the preferred theory is not successful. See *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16 (1957) ("Only in exceptional cases will this Court review a question not raised in the court below.") *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330 (1966) ("We see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals"). (In both *Lawn* and *Neely*, the petitioner also omitted the issue from the petition for certiorari and the Court relied on the combined omission in refusing to consider the issue.)

Plaintiffs have had their day in court. Indeed, they have had twelve different decisions by three district court judges, two appellate panels, one *en banc* panel, the Court, and a federal agency, extending over a period of almost eight years. Plaintiffs had an opportunity to make every argument they wished to make. (Indeed, they have argued both sides of most of the issues.) To remand this case now for yet another round of opinions is to ride roughshod over Defendants' rights to have litigation against them cease at some point. Plaintiffs obviously deliberated on the positions they maintained in this case. When they decided not to contest the mootness of their individual damage claims, that decision was final. They cannot change their minds because they lost their appeal.

II. THE PORTIONS OF THE SEVENTH CIRCUIT OPINION ATTACKED BY PLAINTIFFS ARE MERE DICTA HERE; EVEN APART FROM SUCH DICTA, THE INSTANT CASE IS CLEARLY MOOT. THERE IS NO CONFLICT AMONG THE CIRCUITS.

Plaintiffs' quarrel with the Seventh Circuit's decision in this case is directed not to the court's holding but rather

to a set of "generalizations" contained in dicta at the end of Chief Judge Fairchild's opinion. Specifically, Plaintiffs contend that, if "proposition 2" were followed, a defendant might be able to moot a case before the plaintiff could obtain a District Court determination of class status. That argument has nothing to do with the present case.

The complaint in this litigation was filed in 1970. The class allegations were dismissed in 1972 after extensive briefing. Subsequently, Plaintiffs moved to amend the District Court's dismissal of the class allegations and also sought an appeal. It was not until 1975 that Defendants moved to dismiss the case as moot. Plaintiffs here obtained the District Court's full consideration of the class issue but lost the decision on their class claim. Accordingly, even without the "generalizations" in the Seventh Circuit opinion, *Indianapolis School Commissioners* v. *Jacobs,* 420 U.S. 128, 129 (1975) would require dismissal of this case as moot:

> The case is . . . *moot unless it was duly certified* as a class action pursuant to Fed. Rule Civ. Proc. 23 [prior to the mooting of the class representative's claims. 420 U.S. at 129. Emphasis added.]

The District Court did not "duly certify" any class in this case. Thus, *this case* is moot even if the Seventh Circuit's dicta might be wrong as to cases where there has been no prior ruling on the class action issue.

To the same effect as *Jacobs* are *O'Shea* v. *Littleton,* 414 U.S. 488, 494-495 (1974) and *Hall* v. *Beals,* 396 U.S. 45 (1969). Contrast *Sosna* v. *Iowa,* 419 U.S. 393, 399 (1975):

> If appellant had sued only on her own behalf, [the facts of the case] woud make this case moot and require dismissal. . . . But appellant brought this suit as a class action . . . . *When the District Court certified the propriety of the class action,* the class of unnamed persons described in the certification acquired

> a legal status separate from the interest asserted by appellant. (Emphasis added.)

See also 419 U.S. at 401: "Although the controversy is no longer live as to appellant Sosna, it remains very much alive for the class of persons *she has been certified to represent.*" (Emphasis added.) By contrast, Plaintiffs in this case do not represent anyone else. A decision denying class status and dismissing class allegations totally strips the litigation of its class action character. *Pearson* v. *Ecological Science Corp.,* 522 F.2d 171, 176-178 (5th Cir. 1975).

The *holding* of the Seventh Circuit is mandated by the foregoing recent cases of the Court. Plaintiffs do not gainsay that fact; they merely quibble with *dicta* discussing situations in which there is *not* a prior ruling on the class issues. Even if Plaintiffs' quibble were correct, *this case* would be decided in the same way.

Certiorari is not a device for resolving quibbles or for obtaining advisory opinions on issues which are not before the Court. Plaintiffs' efforts to concoct a "conflict between the Circuits" does not alter the inappropriateness of their request. None of the three cases cited by Plaintiffs as being in "conflict" with the Seventh Circuit's decision arose in circumstances analogous to the present case.

For example, in *Weathers* v. *Peters Realty Corp.,* 499 F. 2d 1197 (6th Cir. 1974) the District Court erred by blurring together the denial of class status with a decision against the named plaintiff on the merits. The Sixth Circuit *reversed* the decision on the merits as being unsupported by the evidence. Since there had not been a decision on the class issue independent of the erroneous decision on the merits, a remand of the class issue was in order—indeed, following the reversal it is hard to see how the plaintiff's claims could have been "moot."

Similarly, in *Workman* v. *Mitchell*, 502 F.2d 1201 (9th Cir. 1974), the District Court denied class certification *solely* because it did not believe a class was necessary to protect the interests of the prison population on behalf of whom suit was brought. The Sixth Circuit found that judgment unwarranted in light of actual events and certified the class. Significantly, the Sixth Circuit did not even reach the question of whether the named plaintiffs' claims were moot or not. 502 F.2d at 1207.

And finally, the Fifth Circuit's decision in *Satterwhite* v. *City of Greenville, Texas*, 557 F.2d 414 (5th Cir. 1977), echoing concerns in *Weathers* and *Workman*, rests on the unique nature of civil rights discrimination cases. The court described these cases as being " 'perforce' class actions" because they necessarily challenge defendant's behavior toward a specific group of persons. 557 F.2d at 419.

None of these three cases can be meaningfully said to "conflict" with the Seventh Circuit decision in the instant case.

III. PLAINTIFFS' CLAIM FOR ATTORNEY FEES LACKS MERIT.

Plaintiffs' third "question presented" concerns their counsels' supposed right to receive fees from Defendants. This argument founders on two grounds.

A. Plaintiffs Are "Judicially Estopped" To Contradict Their Position Taken On The First Appeal In This Case.

In their first appeal in this case in 1973, Plaintiffs' counsel argued that they could not possibly receive fees without a class action certification (which was refused). (R. 751-752.) Plaintiffs are "judicially estopped" to take a

different position now than they took in their first appeal in this same case. *Jett* v. *Zink*, 474 F.2d 149, 154-155 (5th Cir. 1973), *cert. den.* 414 U.S. 854 (1973):

> To dispose of this . . . contention we need only look to the first appeal in this case and to the assertions of the parties before the court at that time. . . . *Sterling Oil has argued one position before this court and now, after obtaining the benefit of that position, has advanced an admittedly inconsistent position in hopes of prevailing again. We hold that it is precluded from utilizing such a tactic.* (Emphasis added.)

The policies underlying the doctrine of judicial estoppel were cogently explained in *Scarano* v. *Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953):

> Such use of inconsistent positions would most flagrantly exemplify that playing "fast and loose with the courts" which has been emphasized as an evil the courts should not tolerate. [Citation omitted.] And this is more than affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.

Accord: *Callanan Road Co.* v. *United States*, 345 U.S. 507, 513 (1953) (alternate ground): "The appellant cannot blow hot and cold and take now a position contrary to that taken in [previous] proceedings . . . ." See IB Moore FEDERAL PRACTICE ¶0.405[8]; Note, "The Doctrine of Preclusion Against Inconsistent Positions In Judicial Proceedings," 59 Harv. L. Rev. 1132 (1946).

B. Plaintiffs Cannot Obtain Fees From Defendants On The "Common Benefit" Theory They Urge.

In any event, plaintiffs' claim for attorney fees lacks merit. The cases they cite involve attorneys who conferred benefits on a class of absent parties and who therefore

received fees *not from the defendants, but from the absent benefited parties.* For example, in *Sprague* v. *Ticonic Bank,* 307 U.S. 161, 167 (1939), the Court awarded plaintiffs' counsel fees out of the fund created for plaintiffs and those similarly situated because "when . . . a fund is . . . created for the benefit of others . . . [there is] the power of equity [to award fees] in doing justice *as between a party and the beneficiaries of his litigation.*" (Emphasis added.) Even where an attorney confers a benefit on a class, the *Sprague* case recognized that "allowances [of fees] are appropriate only in exceptional cases and for dominating reasons of justice." 307 U.S. at 167.

In *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970), the *Sprague* rule was applied to require a corporation to pay the fee of an attorney who benefited the class of the corporation's shareholders. The Court made it clear that the corporation was required to pay plaintiffs' counsel's fees not in its capacity as defendant, but in its capacity as a representative of (and conduit from) the absent benefited shareholders. 396 U.S. at 392-396. Since there was no monetary award from which to subtract a fee in *Mills,* the payment of the fee by the corporation was the only fair and feasible means of having the shareholders compensate the counsel. The Court explained that the basis for the fee award was that:

> . . . the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation . . . . (*Id.* 394.)

The Court in *Mills* noted the narrowness of the rule it applied and reaffirmed that "the general American rule [is] . . . attorneys' fees are not ordinarily recoverable . . . ." 396 U.S. at 391. Accord, 6 Moore, FEDERAL PRACTICE, ¶54.77[2].

CONCLUSION

Out of simple fairness, Defendants, who have been found right twelve times, should not be forced to pay for a thirteenth battle in this seven-year lawyers' war.* Especially they should not have to debate an issue which was first raised in a petition for rehearing after previously having been expressly waived. Such a debate would serve no purpose when there are numerous other grounds for affirmance and the issue involves only *dicta.*

If Plaintiffs are correct that the issues they seek to debate have arisen many times and will arise again many times, surely there will be cases far better suited to consideration by the Court than this one presenting such issues.

Respectfully submitted,

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* If this case is remanded for further proceedings on the class issue, it will be necessary to determine the impact of the Seventh Circuit's recent decision in *Susman* v. *Lincoln American Corp.,* 561 F.2d 86 (7th Cir. 1977). In *Susman* and a companion case, the Seventh Circuit upheld the denial of class action status in two cases in which two of Plaintiffs' attorneys in the present case were involved. In both cases, the District Court found that close relationships between the named plaintiffs and the attorney who would represent the class precluded adequate representation of the class. Discovery suggests that a similar situation may be present here. Additional discovery on the point would be required.